APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 93-5969

JONATHAN WADLEIGH, *et al.*,
Plaintiffs,

v.

RHONE-POULENC RORER, INC., *et al.*,
Defendants.

FIRST AMENDED COMPLAINT

Plaintiffs, on behalf of themselves and as representatives of a class of persons similarly situated, make the following allegations against defendants:

* * * *

LIABILITY OF MANUFACTURERS

COUNT ONE

NEGLIGENCE

66. Plaintiffs reallege paragraphs 1 through 65 as if fully set forth herein.

67. Defendant manufacturers were negligent in collecting and processing donor plasma, and in manufacturing, marketing, distributing and selling AHF products. Plaintiffs and members of the class have suffered injury and damages because of defendants' negligence.

68. Defendant manufacturers acting through their agents, servants and employees, acting within the course

and scope of their employment, breached their duty of reasonable care to plaintiffs and members of the class by reason of the following acts and omissions:

a. Failing properly to apply available technology to manufacture AHF product that would be free of viral infectivity;

b. Failure timely to employ, develop and promote adequate research and development efforts in support of product safety, including the testing, development and/or license of technology to make AHF concentrate safe from viral infectivity.

c. Failure to withdraw AHF products from the market once defendants knew or should have known that they may be contaminated with HIV;

d. Failure timely and adequately, to warn of the risks of using AHF products when defendant manufacturers knew, should have known, or were reckless in not knowing, of viral contamination of their products, including at a later point in time the likelihood of HIV contamination;

e. Failure to advise plaintiffs and other class members, and the medical community, of safer methods for the treatment of persons with hemophilia as compared to those products manufactured by defendants;

f. Failure to adequately screen plasma donors to exclude persons at high risk of infection with HIV;

g. Failure to timely recall contaminated AHF products;

h. Failure to properly comply with applicable Federal statutes and regulations governing the sale, supply, and labeling of drugs and products, including biologics; and

i. otherwise failing to exercise due care under the circumstances.

69. As a direct and proximate result of said defendants' negligence, plaintiffs and members of the class were caused to suffer substantial and severe harm, injury and damage.

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL - 986
No. 93 C 7452

IN RE FACTOR VIII OR IX CONCENTRATE
BLOOD PRODUCTS

PRODUCTS LIABILITY LITIGATION

Chicago, Illinois
September 13, 1994 2:05 p.m.

TRANSCRIPT OF PROCEEDINGS—status
BEFORE THE HONORABLE JOHN F. GRADY

APPEARANCES:

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* * * *

(The following proceedings were had in open court:)

THE CLERK: 93 C 7452, In Re Factor VIII, for status.

THE COURT: Good afternoon.

MR. SHRAGER: Good afternoon.

MS. KIMBALL: Good afternoon, your Honor.

MR. BARR: Good afternoon, your Honor.

MR. FUSON: Good afternoon.

MR. O'REILLY: Good afternoon.

THE COURT: We have got a fair-sized agenda this afternoon. Let me assure any of you who wish to be heard that you will be heard some time during the course of the afternoon, however long it may take.

I have read the defendants' motion to reconsider my ruling on the matter of class certification but not the brief

in support. I have not had a chance to read that yet. The motion itself is a rehash of what I have already considered and ruled upon. Unless there is something new and different in the memorandum, it is extremely unlikely that I will grant the motion to reconsider.

I tell you that so you will know that we have very little likelihood of wasting our time this afternoon. And I will rule on the motion to reconsider very shortly just as soon as I have had an opportunity to read the memorandum and any cases I might want to read in light of the arguments raised in the memorandum.

There is an alternative motion for a 1292 certification of the class certification issue.

Mr. Shrager, let me ask you, just as a preliminary matter, do you have any impression as to whether that could advance the mutual interests of all parties to get a final determination of the propriety of class certification before proceeding further with this long—or on this long road that lies ahead of you?

MR. SHRAGER: I do, your Honor. I think the 1292 request fails, both of the principal criteria well-known to the Court and the respective—the existence of a controlling question of law as to which there is a substantial difference of opinion. The controlling question of law here would, of course, be certification.

Those issues which were articulated by the Court and drove the certification opinion, as we understand it, were the issues of typicality, manageability, economics, and other variables, again well-known to counsel and the Court. They are discretionary items, and I do not believe, with respect to my colleagues' papers, that there is a substantial difference of opinion. I think these are mainstream discretionary matters, and if I am incorrect in that estimate and should the Court agree, I think it is a mandamus matter.

The second criteria, would it materially advance the litigation, I suggest not, sir. The statistics show that the median time for matters from notice of appeal to dis-

position in the Seventh Circuit, 13.5 months are the most current figures. And that is in a straightforward appeal scenario let alone a case in which the Seventh Circuit would need at the threshold even were the matter to be certified to decide whether it should hear it.

I would strongly encourage the Court that we move ahead. I do not believe for plaintiffs that we feel at very great risk that the certification issue will be troublesome once the underlying merits are resolved.

THE COURT: All right, thank you, Mr. Shrager. I will bear that in mind as I read the defendants' brief.

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL-986
No. 93 C 7452

Chicago, Illinois
December 6, 1994
11:00 a.m.

IN RE FACTOR VIII OR IX CONCENTRATE
BLOOD PRODUCTS

PRODUCTS LIABILITY LITIGATION

TRANSCRIPT OF PROCEEDINGS—status
BEFORE THE HONORABLE JOHN F. GRADY

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* * * *

MR. FUSON: All right. Your Honor, there was one other matter relating to the notice issue but relating actually to the certification order. We had submitted yesterday, and I realize it is short notice, a motion to amend the certification order so that it is clear that all negligence claims that might be brought are covered by this order and will be covered by this trial. And if you want some discussion of that, Mr. Magaziner is prepared to do so. But I thought I would raise it now before you got into the substance of the notice per say.

THE COURT: Well, I have a negative reaction to that because what you are asking me to do is to decide issues that could arise in the future as to the res judicata effect of a judgment in this case. Whatever happens is going to happen, and the result of it in collateral cases will be for some other courts to decide. I don't think it would be appropriate for me to include that in this certification order.

MR. FUSON: I think—excuse me.

THE COURT: I share your belief that that is probably what the effect of a judgment would be, but I don't think it is the function of a class certification order to say that. I have not seen a great many class certification orders, but I have never seen one that contains the kind of statement that you propose.

MR. FUSON: Could Fred address it briefly?

THE COURT: Yes.

MR. MAGAZINER: Thank you, your Honor, and I do apologize for filing that motion so late in the game.

THE COURT: That is all right. I read it.

MR. MAGAZINER: As we wrestle with these issues, there are more and more issues we see, and we thought we ought to bring that to your attention.

It had been our understanding, your Honor—when I say "our," I am talking about the defendants—that it was your Honor's intention that if there is a trial in this case that results in a finding that none of the fractionators was negligent that all negligence claims would be barred and individual members of the class would not thereafter be able to make claims against the fractionators contending that a fractionator was negligent even though there had already been a finding that the fractionators were not.

The reason this becomes a little murky, your Honor, is that there are claims that have been made in cases in the past which are not global claims; they are not claims of general applicability. For example, the—although the plaintiffs want to try what the defendants call the serendipity claim; that is, if we were negligent for not heat treating factor concentrate in the early and the late 1970s, and that is a claim which might have some general applicability to a whole lot of class members.

There have been other claims tried and asserted over the years such as a particular lot of factor concentrate was heat treated but heat treated improperly or negligently so that it remained infectious, or that a particular lot was processed after donor screening measures had been implemented but that the donor screening measures in a particular case were not applied properly and that the fractionator was negligent in processing that lot.

Those kinds of claims may be applicable only to one or two or a half dozen or a dozen class members, and it seemed to us that your Honor's intention was that this trial would bar trials of those claims, subsequent trials of

those claims, as well as trials of the more general claims that the plaintiffs have described in the past. If that is not your Honor's intention, then we would respectfully suggest that the result would be that there will be not only a class negligence trial but other negligence trials thereafter, and it would be—create quite a bit of confusion and splitting of causes of action and all sorts of other problems. And we had not understood that to be your Honor's intention.

But we understood and hoped your Honor's intention was—and I say hope in the sense that we don't believe there should be certification, but if there is, we hope this is your intention—that the class counsel, Mr. Shrager and his colleagues, will exercise their professional judgment on which claims should be tried to the jury, and if someone casts his lot with the class; that is, does not opt out and elects to participate as a class member, that that person will then rely on Mr. Shrager's judgment as to which claims are tried and which claims or potential claims are not tried, and if a claim is not tried, it is barred.

THE COURT: The problem with that that I see immediately is that you have raised a question I never considered. It has always seemed to me that the negligence claims are global, and in view of that, it did seem to me that the result of the class trial would be dispositive on the negligence issue.

Now, you have suggested something I hadn't previously considered; namely, that there could be a particular event or a particular practice that was not common to the class that would not be tried in the class action. And that raises the interesting question of whether res judicata would bar that particular claim; for instance, improperly heat treating something.

Now, we are all familiar with the general rule that res judicata covers not only what was not only tried but pled but what could have been pled and tried in the case. But that doesn't help us much because you can't try all

of the individual variations that might have occurred in a class action. That would cause the trial to degenerate into a—the very kind of multiplicity of individual trials that I sought to avoid in certifying this class.

So I think you have raised a genuine problem to which I don't know the answer.

Mr. Shrager, what do you say?

MR. MAGAZINER: May I just give you part of our answer before Mr. Shrager takes the podium?

THE COURT: All right.

MR. MAGAZINER: We think that the problem can be solved, your Honor, by the notice making it clear that that is part of what people are buying into if they opt to participate in the class.

I think that the greatest problem would be if we were to treat the case the way we suggest it should be treated but no notice was given that alerted people who may have those individual particular kind of claims of what the effect would be on those claims. So we think some of these problems could be solved perhaps—

THE COURT: How many such claims do you think there might be at the maximum?

MR. MAGAZINER: There could be many, many because over the years claims that have been asserted against the fractionators in the 2- or 300 cases that have been filed to date, many of them have involved allegations along those lines. A lot of those cases, of course, have not gone very far because of statute of limitations problems or other problems.

But that is not an uncommon kind of thing for people to allege because people who took factor concentrate late in the time line and became infected late or claimed to have been infected late sometimes resort to that sort of claim. I don't think anyone can put numbers on it, and because it is a class action, we won't know anything about the individual class members and what their circumstances are. And I don't think we will have a good handle on that at any time.

But I think it could be many claims.

THE COURT: Mr. Shrager.

MR. SHRAGER: I understand the issue, and I think the argument raised by my neighbor in Philadelphia is—I think he is in a general sense likely right on the law so far as it goes, that if the plaintiff were to assert negligence in ten respects, go to trial on seven, and then following an adverse verdict indicate, well, we might do it better with practice and go after the other three, notions —I am reaching back 35 years or more—of merger might foreclose.

THE COURT: I think we are more concerned with the case that arises outside the pleadings in this case. It is a negligence case, but it is not the kind of negligence that is either pled or intended to be tried in this case.

MR. SHRAGER: It is difficult to—

Considering the scope of the complaint, your Honor, it is difficult for me to hypothecate a case that I can think of that would somehow be outside the scope of the pleadings. However, there may be a bit more to this than meets the eye, and I think it is not time to deal with the issue. That is the only point I wanted to make here, that whatever the implications of a verdict on negligence are, they will be. And it will be time enough to consider that when a verdict is rendered.

I am not aware of what prejudice there is or what purpose is served, nor did Mr. Magaziner suggest any prejudice or purpose by including it in the notice. He used a—

THE COURT: He wants me to weigh in on his side.

MR. SHRAGER: Oh.

He used an interesting example when he referred to heat treatment, inadequacy of heat treatment, and I was thinking about that. And there may be some number I am sure not to be counted in the hundreds, as he suggests. There are very few cases. The defendants themselves have suggested that there are no such cases.

So I do want to respond to the Court's earlier question that there are likely very, very few cases involved; yet those cases that are very late cases may be terribly substantial cases. So the issue has more to it. I don't think we should burden the Court with that further at this time except to say there is no reason—none has been suggested again—why the Court needs to deal with that now.

MR. MAGAZINER: May I respond, your Honor?

THE COURT: Well, let me ask first: Is there any expectation at all that, as you get down toward the trial of the case, your theory may expand to include improper heat treatment?

MR. SHRAGER: Oh, yes.

THE COURT: Because if it does, then the answer to Mr. Magaziner's question is yes.

MR. SHRAGER: Yes.

THE COURT: If it doesn't, then, as I say, I am not sure what the answer is.

MR. SHRAGER: Our obligation as class counsel, your Honor, is surely to explore all theories which responsibly would support recovery in any case. That is the irreducible minimum of our professional obligation acting in a representative capacity. So the answer to any such question would necessarily be yes.

Are there one or more such cases? Yes.

Are there many such cases? Likely not.

Is it an issue being explored? Yes.

MR. MAGAZINER: If I may respond, your Honor, I think the points Mr. Shrager made are good ones, but I would put them in a different perspective. If there is a case of late infection from heat treated factor concentrate, I think all of us would concede that that is a case of some potential exposure for the defendants and some potential interest for whoever the plaintiff is who may have such a case.

I think this is the time when the plaintiffs have to decide whether they are going to try that case or not because if that case is not going to be tried, the class member who has such a case will be ill-served by a notice that fails to tell him that if he wishes to present that case, he must opt out of the class.

I would also respond to something else Mr. Shrager said about his professional duty being to explore every possible claim. The fact is that if Mr. Shrager presents not only all the claims of global or general applicability but all the claims which may affect only one or two or a handful of class members, this trial is going to be even longer than what is no doubt already going to be a very long trial.

THE COURT: Well, we are not going to get into that at the trial, I mean. If we have got something that takes a week to try and involves only one plaintiff or a very small number and it is not a class-wide issue, I don't think we are going to undertake it.

MR. MAGAZINER: Well, I would agree that that is—

THE COURT: But the very fact that we are not going to undertake it leads me to have very great doubt as to what the res judicata answer is. So I am going to deny your motion to include your suggested language in the class certification notice. I think it is premature, and I don't think you know the answer, and I don't know the answer. So we are not going to delay the class notice to find out what the answer is because I think it is for somebody else to say, in any event.

It is going to be for some judge in some other case to rule on the res judicata effect, if any, of a judgment in this case as far as future litigation is concerned.

MR. MAGAZINER: Your Honor, I don't want to overstay my welcome, but if I could just perhaps point out that if the notice alerts people to the possibility that their claims, individual-type claims, will not be tried, then

notice will be more accurate and consistent with what your Honor has said than the notice that either the plaintiffs or the defendants have submitted to the Court to date.

THE COURT: I am just not persuaded that the problem is going to be as great as you fear.

MR. MAGAZINER: Thank you.

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